

Challenging So-Called "Objective" Psychological Tests: The Use And Abuse Of Psychological Testing In Trials, Sentencing, Parole Consideration, And Custody Disputes

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Criminal and civil courts and the New Jersey State Parole Board have accepted the use of psychological testing as an important component of making legal and factual determinations in both the civil and criminal litigation and for considerations as to whether a person is suitable for release on parole. Such testing may add an air of scientific authority resulting in an over reliance on conclusions drawn from the instrument. While psychological testing does add value, the courts recognize and it must be emphasized that the ultimate determinations involving psychological issues reside with the court and/or fact finder. The "objective test" result and related "expert" opinion may be considered, but are not binding on the court and/or fact finder. Given the stakes in establishing defenses in criminal law, sentencing, whether someone may be returned to society in parole determinations, and family law custody disputes, counsel must understand the benefits and limitations of psychological testing in the forensic context.

Mental Health professionals are permitted to bolster their conclusions with the use of psychological testing instruments. Such testing instruments have commonly been given the misleading designation of "objective testing." In practice, such testing is far from "objective." There are many reasons that such tests are not "objective" and must be scrutinized:

- Many psychological testing instruments are not meant to be used in forensic context (this is a frequent area of abuse);
- The administration of the test itself involves subjective assessment and conclusions drawn by the professional administering the instrument;
- The tests may be administered incorrectly and the scoring completed either in error or in disregard of the instructions and/or cautions in the training/scoring manuals themselves;
- The test itself may be inherently unreliable; and
- The test scoring may be based upon hearsay provided by third parties and/or self-reporting by the subject, information that may not be complete, accurate, and/or has not been verified.

It is therefore critical that when confronted with the results of a so-called "objective" psychological test that counsel investigate the purpose of the instrument, the manner in which it is administered, and how it is ultimately scored.

- First, counsel should obtain a copy of the training and/or scoring materials related to the instrument. Many of the training and scoring manuals set forth the limitations of the instruments and caution about its use in forensic settings. It is surprising how often tests are used and relied upon in contexts that are inappropriate;
- Second, counsel should research the history of the use of the instrument and peer reviewed journal articles evaluating the instrument. It is remarkable that in some cases the creator/author of the instrument itself warns against misuse and/or journal articles report "false positives," or even that the instrument fails to satisfy accepted legal standards of scientific reliability;
- Third, counsel should obtain the raw data upon which the expert scored the results of the test and rescore the test (rescoring to be done by counsel's own qualified expert). Remarkably, either through

erroneous administration, simple error, or intentional skewing, the scoring of the raw data itself may be incorrect.

The results of all “objective” psychological tests should be closely evaluated and challenged. It is important to understand the limitations of such testing when “objective test” results are used against your clients and to understand the limitations of such testing when used to advance the interests of your clients.

Stay posted - I will follow up this article with a series of individual posts involving assessments of various “objective” psychological tests that, for better or for worse, have found their way into our judicial system.

Attorney

- Eric Marcy

Practice

- Criminal Defense